

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOSEPH SEDLAR,

Plaintiff-Appellant/Cross-Appellee,

and

DEANA SEDLAR,

Plaintiff-Appellant,

v

RONALD L. THOMPSON d/b/a R. L. T.  
CONSTRUCTION,

Defendant/Third-Party Plaintiff,

and

CHRISTOPHER ZERVAN d/b/a ZERVAN  
MASONRY,

Defendant/Third-Party Defendant,

and

WILLIAM NEUHAUS, JR.,

Defendant-Appellee/Cross-  
Appellant.

UNPUBLISHED  
November 18, 2003

No. 243712  
Saginaw Circuit Court  
LC No. 01-039221-CK

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Before: Fort Hood, P.J., and Murphy and Neff, JJ.

PER CURIAM.

In this interlocutory appeal, plaintiffs appeal by leave granted an order of the trial court, granting in part a motion for summary disposition by defendant William Neuhaus, Jr., a former Village of Chesaning building inspector, and dismissing him from liability in this negligence action. The trial court granted summary disposition on the basis of no duty, but denied summary disposition on the bases of gross negligence and proximate cause. Defendant Neuhaus cross-

appeals the trial court's denial of summary disposition on the latter bases. We reverse the grant of partial summary disposition on the basis of no duty and affirm the denial of summary disposition on the bases of gross negligence and proximate cause. We remand for further proceedings.

## I

Plaintiffs entered into a contract with defendant Ronald Thompson, doing business as RLT Construction, for construction of a house in Chesaning.<sup>1</sup> Defendant Christopher Zervan was the subcontractor responsible for the concrete work, including the home's foundation. Defendant Neuhaus was the local building inspector. Plaintiffs alleged that in October 1998, Neuhaus inspected and approved the home's footings and foundation, despite the fact that the drainage system around the foundation and footings was not covered with filter membrane material to prevent the surrounding soil from washing into the drainage system, as required by § 1834.3 of the 1997 Uniform Building Code, which the parties agree was applicable to the construction. Plaintiffs claim that Neuhaus indicated to Thompson and/or Zervan that they did not need to comply with the building code requirements of § 1834.3. The home was completed in September 1999.

In the spring of 2001, plaintiffs found that the masonry blocks in the basement wall had separated and the basement floor was cracked. Plaintiffs contacted the then-current building inspector, Gerald Hall, who told them that the soil under the foundation and basement floor had eroded, leaving the home's foundation unsupported. The cost of repairs was estimated at over \$54,000. Plaintiffs filed suit against Thompson and Zervan in the summer of 2001, and later amended their complaint to include a claim of gross negligence against Neuhaus. In lieu of filing an answer, Neuhaus responded with a motion for summary disposition pursuant to MCR 2.116(C)(7) and (10), arguing that he was entitled to judgment as a matter of law on three grounds: first, that he owed no duty to plaintiffs; second, that his actions were not the proximate cause of plaintiffs' injuries, and third, that he was entitled to governmental immunity for his actions pursuant to MCL 691.1407(2) because his alleged actions did not constitute gross negligence.

The court denied summary disposition with regard to Neuhaus' arguments relating to proximate cause and gross negligence, concluding that reasonable minds could differ with regard to whether Neuhaus was grossly negligent and with regard to whether his conduct was the proximate cause of plaintiffs' damages. However, it nonetheless granted his motion for summary disposition pursuant to MCR 2.116(C)(8) on the basis that plaintiffs failed to establish that Neuhaus owed a duty to plaintiffs in the absence of a special relationship.

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<sup>1</sup> The facts are summarized for purposes of this appeal. This factual recitation is not intended to be conclusive with respect to disputed factual issues on remand.

## II

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition of a gross negligence claim is proper under MCR 2.116(C)(8) if the plaintiff fails to establish a duty in tort. *Beaudrie, supra* at 130. A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Id.* at 129. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. *Id.* at 129-130. The motion should be granted if no factual development could justify recovery. *Id.* at 130; *Spiek v Dep't of Transportation*, 456 Mich 331, 337, 572 NW2d 201 (1998).

## III

Plaintiffs argue that the trial court erred in requiring them to show a special relationship before the building inspector could be found to have any duty to them as owners of the inspected building. We agree.

It is undisputed that the public duty doctrine, and its concomitant "special relationship" exception, applies only in cases involving police protection and is therefore inapplicable to the present case. *Beaudrie, supra* at 140-141. Nonetheless, the common-law rule that no individual has a duty to protect another who is endangered by a third person's conduct absent a special relationship is still viable. *Id.* at 141. We disagree, however, that this rule applies on the facts of this case.

Plaintiffs alleged that Neuhaus breached a duty owed to them with regard to the inspection and approval of the construction of their home, and that as the local building inspector, Neuhaus was responsible for inspecting the foundation of plaintiffs' home to insure that it met all applicable building codes. They allege that Neuhaus affirmatively or by his silence indicated to Thompson and Zervan that they need not comply with the requirements of the 1997 Uniform Building Code, otherwise applicable to the construction of their home, which was the proximate cause of plaintiffs' injury. Under these circumstances, plaintiffs need not show a special relationship because the alleged breach involves a duty owed directly to plaintiffs, not merely a claim that Neuhaus had a duty to protect plaintiffs from the actions of a third party. The trial court erred in granting summary disposition on the basis that plaintiffs failed to show a special relationship and therefore defendant had no duty to plaintiffs.

## IV

On cross-appeal, Neuhaus argues that even if this Court finds error in the grant of summary disposition on the basis of no duty, he is nevertheless entitled to summary disposition because the court erred in concluding that there were genuine issues of material fact with regard to gross negligence and proximate cause. We disagree.

Neuhaus moved for summary disposition on the basis of governmental immunity pursuant to MCR 2.116(C)(7), arguing that his alleged actions did not constitute gross negligence and were not “the” proximate cause of plaintiffs’ alleged injury. We review de novo a trial court’s grant of summary disposition under MCR 2.116(C)(7). *Maiden, supra* at 118. To survive a motion for summary disposition based on governmental immunity, the plaintiff must allege facts giving rise to an exception to governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). This Court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. *Id.*; *Maiden, supra* at 119.

A

We find no error in the trial court’s denial of summary disposition on the basis of governmental immunity, MCL 691.1407(2), based on Neuhaus’ claim that the alleged conduct does not amount to gross negligence. The court concluded that reasonable minds could differ regarding whether Neuhaus’ conduct constituted gross negligence. We agree.

Plaintiffs alleged that Neuhaus indicated to Thompson and/or Zervan that they need not comply with the requirements of the 1997 Uniform Building Code, which were applicable to the construction of their home. Plaintiffs submitted documentary evidence in response to defendant’s motion for summary disposition in support of their allegations. They provided answers to interrogatories from Thompson, which stated that “[b]ased upon geological conditions in the area, William Neuhaus indicated that use of filtering membrane was contraindicated and, therefore, was not required by code.”

Plaintiffs also submitted the affidavit of the current building inspector for the Village of Chesaning, Gerald Hall, who opined that “the cause of the departure of the footing from the basement wall is that soil from beneath the home was carried away through the drain tile, leading to a loss of support beneath the home, and causing the collapse of the foundation.” Further, “the lack of a filter fabric on both the premier drain tile and on the gravel drain tile as required by the 1997 Uniform Building Code allowed the soil to migrate into the foundation drain tile.” Hall’s affidavit also averred, that “[t]here are no circumstances I am aware of which would have contraindicated the use of the filter membranes as required by the 1997 Uniform Building Code at the time the Sedlar home was built in the fall of 1998. Further, the Code itself does not allow for waivers or variations of the technical requirements of the Code, and would not have allowed for the waiving of the filter fabric requirements.”

Under the governmental immunity statute, public employees are immune from liability for conduct that does not amount to “gross negligence.” MCL 691.1407(2); *Beaudrie, supra* at 138-139; *Maiden, supra* at 121-122. Gross negligence means “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(2)(c); *Beaudrie, supra* at 138; *Maiden, supra* at 122. Given the allegations, and viewing the evidence under the applicable standard of review, we find no error in the court’s conclusion that reasonable minds could differ whether Neuhaus’ conduct constituted gross negligence. *Id.* at 130; *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

B

Similarly, we find no error in the trial court's denial of summary disposition on the basis of causation. The court found that there was a clear factual dispute regarding the proximate cause of plaintiffs' injuries because a reasonable jury could find that Neuhaus' failure to enforce the building code was the proximate cause of plaintiffs' harm.

Under the governmental immunity statute, MCL 6911407(2)(c), government employees are immune from tort liability unless the employee's conduct amounts to gross negligence that is "the" proximate cause of the alleged injury. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). The applicable standard for proximate cause is "the one most immediate, efficient, and direct cause of the injury or damage." *Id.*

Here, plaintiffs alleged that Neuhaus indicated to Thompson and/or Zervan that they did not need to comply with the building code requirements concerning the use of filter membrane covering. Plaintiffs submitted documentary evidence in which Thompson indicated that the building code requirements at issue were waived by Neuhaus, who indicated that based on geological conditions in the area, the use of a filtering membrane was contraindicated. This evidence, in conjunction with the affidavit of Gerald Hall concerning the cause of the collapse of the foundation in plaintiffs' home, is sufficient to survive summary disposition under the standard of *Robinson, supra*. The trial court properly denied summary disposition on this basis because reasonable jurors could find that Neuhaus' conduct was the proximate cause of plaintiffs' injuries. *Robinson, supra* at 462-463; *Vermilya, supra*.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ William B. Murphy

/s/ Janet T. Neff